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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re JAMES THERON ELLIOTT, on Habeas Corpus.	H035447 (Santa Clara County Super. Ct. No. 60517)

In February 1976, petitioner James Theron Elliott was convicted by a jury of conspiracy to commit murder, robbery, grand theft and insurance fraud, first degree murder and first degree robbery. (*People v. Elliott* (1978) 77 Cal.App.3d 673, 677 (*Elliott*).) Elliott was initially sentenced to death, but after the California Supreme Court held that the death penalty was unconstitutional, his sentence was modified to life imprisonment. (*Id*. at pp. 678, 689.)

On April 23, 2009, the Board of Parole Hearings (Board) found Elliott unsuitable for parole. The Santa Clara County Superior Court subsequently granted Elliott's petition for a writ of habeas corpus and ordered the Board to conduct a new hearing for Elliott within 95 days. The superior court found that the Board violated "the statutes, regulations, and case law," by basing its finding of unsuitability on the fact that Elliott chose not to discuss the life crime during his parole hearing.

Respondent George Neotti, acting warden of the Richard Donovan Correctional Facility (Warden), appeals from the order. He argues that the superior court exceeded its authority by deciding an issue that was not properly before it, i.e., whether Elliott's rights not to admit guilt or discuss the crime were violated by the Board. Warden also contends

that the Board did not violate Elliott's rights in this regard, but that even if it did, the error was harmless as there is some evidence in the record to support the Board's decision.

We disagree and shall affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The 2009 Board hearing

1. The life crime

The Board incorporated by reference the facts relating to the commitment offense from the published opinion on Elliott's direct appeal, *Elliott*, *supra*, 77 Cal.App.3d 673, and we set forth those facts in full below.

"In July 1972, Frank Richards and appellant became partners in a restaurant chain in southern California. They took out insurance policies on each other's lives and the policy on Richards' life was $100,000.

"[Charles] Thomas, who is Elliott's uncle, went to Richards' office on December 3, 1973, and at that time, held a revolver on him, advised him to give him his money, and shot him twice in the chest and then in the head.[1] Richards saw Thomas pick up the money and run, and at the trial identified him as the robber.

"Three weeks later, Thomas wrote out a statement regarding this shooting, stating that Elliott hired him to kill Richards for a sum of money. Thomas then instructed his wife to read this statement to Elliott on the phone, which Mrs. Thomas did, stating that if Elliott didn't give Thomas the money, Thomas would send the statement to the police.

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[1] Richards survived, and the evidence of his shooting was introduced at trial to establish a conspiracy between Thomas and Elliott to murder Richards so that Elliott could collect on the life insurance. (*Elliott*, *supra*, 77 Cal.App.3d at p. 684.) The Court of Appeal rejected Elliott's challenge to the admission of this evidence, finding that it showed a "common plan . . . [i.e.,] a planned professional killing with financial gain as the motive for the killing, with Mr. Elliott as the recipient of that gain." (*Id*. at p. 686.) Though this was not the specific crime for which Elliott received his life sentence, it was part of the reported decision on appeal and thus properly considered by the Board.

As of November 1974, Thomas had not received the money that Elliott promised for the assassination of Frank Richards. However, Elliott did assist Thomas who was on welfare to purchase a home, by giving him a reference which falsely stated that Elliott had employed Thomas for 10 years.

"Stephen Gilbert and Nicholas Krager, casual friends of appellant, testified that in 1973 he told them that he wanted to kill his business partner and offered Krager, a former policeman, $10,000 to do the job.

"In November 1974, Robert Torres opened a jewelry store in Oakland and employed Copansky as a sales manager. Torres approached Thompson for a loan using accounts receivable as collateral. Thompson suggested appellant Elliott as a lender. Elliott said that as a condition of the loan, Torres and Copansky would each have to take out $500,000 insurance policies with appellant Elliott as beneficiary. They applied for the insurance on November 5, 1974 and on November 15, the policies were cancelled at their request and the loan agreement fell through.

"In November of 1974, appellant asked Virginia Thomas to purchase a revolver for him. Mrs. Thomas did so, selecting a .38 caliber revolver at a gun store in Pomona. A few days later, Elliott asked Mr. and Mrs. Thomas to drive to northern California and gave to Mrs. Thomas information which she wrote in a spiral notebook. He gave her the names and home addresses of Robert Torres and Paul Copansky and the addresses of Keepsake Diamond Center in Oakland and Carte Jewelers in San Jose. Elliott told Mrs. Thomas that she could identify Torres and Copansky if she entered their store and asked to examine expensive pieces of jewelry. The owner or manager of a jewelry store typically handles such merchandise. Elliott also gave Mrs. Thomas $50. That night the Thomases drove north, arriving at a Ramada Inn in Fremont early in the morning of November 13.

"Mr. and Mrs. Thomas left the motel at 10 a.m. and drove to 4560 Thornton Avenue, then the home of Robert Torres. They parked across the street for a short time

and then left, driving to a bar in Fremont where Thomas made telephone calls. While in the bar Thomas told his wife that the purpose of the trip was to shoot one of the men whose names she had written down in her notebook.

"After making a 15-minute telephone call to Elliott, Thomas drove to the Westgate Shopping Center in San Jose. Arriving there, the Thomases searched for Carte Jewelers. Thomas told his wife not to enter because he did not want Daniel Thompson to see her. He gave her his gun, possibly the revolver which she had purchased several days earlier for Elliott, and entered the store. When Thomas left the store, he said that he had to contact Elliott. Unable to reach Elliott by telephone, Thomas returned to the jewelry store where he remained for 20 minutes. Upon leaving the store, Thomas told his wife that Elliott had changed plans and that he was now supposed to 'get the other guy.' They went to a bar in the shopping center where Thomas placed a telephone call to Thompson to discover the make and model of the car which his would-be victim drove. Thomas gave the information to his wife, who wrote it on a slip of paper which she gave to her husband.

"Thomas, who had consumed several drinks in the bars in Fremont and San Jose, was becoming very drunk. Mrs. Thomas suggested that he terminate the plan to kill Torres or Copansky and return to southern California. Thomas could tell Elliott that the store was too crowded to permit him to shoot either of the men. Thomas agreed to go home.

"The Thomases spent several hours in a restaurant in the shopping center where Mrs. Thomas tried to induce her intoxicated husband to eat. They returned to their car but could not start it. Unable to obtain help in a service station or to telephone Thomas' brother William in Mountain View, they took a taxicab to the Vagabond Motel in San Jose. Before leaving the shopping center, Mrs. Thomas put the gun in the trunk of the car.

"Thomas was able to contact his brother the following day. William Thomas and Bob Anderson drove Mr. and Mrs. Thomas to the Westgate Shopping Center, where they succeeded in repairing the stalled car. Later joined by William's wife, Ruth, the four persons went to several bars in San Jose and Redwood City. Mr. and Mrs. Thomas left for southern California at about midnight.

"Sometime later Elliott came to Thomas' house in the morning. He asked for the gun and the ammunition Thomas had bought. He test fired the gun in Thomas' back yard, trying a balloon and a potato as silencers. Appellant told Mrs. Thomas to get some clothes ready for her husband because he and appellant were taking a business trip 'up North.' Appellant called Danny (Thompson) a couple of times. Mrs. Thomas drove Thomas to appellant's house later that day.

"An appointment was arranged for Ben Rudman to meet Danny Thompson on November 26, 1974, at the jewelry store of Mr. Torres and Mr. Copansky. Thompson called Rudman while at Torres' and Copansky's store and arranged to meet him at Carte Jewelers in San Jose to buy a ring from him. Appellant went to Carte Jewelers when Rudman and Thompson were there, and when the last employee went home, the only ones left in the jewelry shop were appellant, Thompson and Rudman. Later that evening, Rudman and three other men, one of whom resembled Elliott, went to a restaurant and attempted to get dinner.

"The last person known to have seen Rudman alive was Angelo Lygizos, owner of a restaurant in San Jose. He testified that Rudman had eaten in his restaurant on November 22 and 25, testimony verified by master charge receipts, and that he and three other men came to his establishment at about 11 p.m. on November 26. One of Rudman's companions resembled Elliott. Since the kitchen was closed, Lygizos suggested that Rudman and his friends dine elsewhere.

"The next day, November 27, 1974, Mrs. Thomas picked up Thomas at the Ontario airport. He was wearing different clothes than when he left home, although he

didn't take any luggage. The shirt he was wearing had blood on it, and he was nearly drunk. On the same day, he gave Mrs. Thomas a gold ring with yellow and white diamonds.

"On December 1, 1974, Mr. Rudman's car was found at the airport and his body was found in the trunk. He had been shot three times and he had been dead three days or longer. One of the bullets found in his body was fired from the same gun as the bullets found in Thomas' back yard.

"Charles Thomas later told his wife that he shot Rudman three or four times in the rear seat of the latter's car. Appellant then told Thomas to take from the body a check for $4,000 which he had written for the purchase of jewelry.

"On December 8, appellant gave Thomas Dr. Feld's Datsun and Thomas was to drive to Mexico, forge ownership papers, return it to Elliott who would sell it and give Thomas $1,000. Elliott later gave Mrs. Thomas Rudman's briefcase and told her to burn it; in it she found jewelry belonging to Rudman.

"Thomas informed the police that Elliott had made a false report of a robbery when he claimed the loss of $360,000 worth of jewels. He told the police this after Elliott had refused to bail him out on charges he had stolen the Datsun 240Z.

"In July of 1974, Elliott reported as stolen his 1973 Chevrolet Malibu and several pieces of jewelry, for which his insurance carrier compensated him with a draft for $23,125. Appellant gave the draft, ostensibly signed by his wife and him, to Eric Waller, his insurance agent, and asked for cash. Waller complied, retaining about $3,000 which covered Elliott's outstanding debts to him and paying appellant about $20,000.

"Nancy Elliott, appellant's former wife, testified that several of the items allegedly stolen from Elliott in 1974 belonged to her. She signed neither the proof-of-loss statement nor the draft issued by the insurance company, although both documents bore her name. The proof-of-loss statement had been notarized by Janice Susan Nissen, appellant's secretary and girl friend.

"Mrs. Elliott also testified that appellant was still driving his Chevrolet in December of 1974, several months after he reported it stolen. Although the car had been red when it was purchased, it was brown when Mrs. Elliott saw it late in 1974. Appellant repainted the car at the Laverne Autocraft Body Shop in Laverne, California, in November of 1974.

"Elliott's defense consisted of three parts--first, he attempted to cast doubt on the prosecution's evidence that Ben Rudman died on November 26, 1974; second, he tried to show that he had no motive to rob Rudman because his construction company was financially solvent; third, he sought to impeach Virginia Thomas' credibility. Elliott himself did not take the stand." (*Elliott*, *supra*, 77 Cal.App.3d at pp. 678-682.)

At the outset of his 2009 parole hearing, Elliott declined to discuss the commitment offense, but said he would address the panel with regard to postconviction factors. When asked how he felt about the life crime, Elliott repeated his expression of remorse for the victim, saying "there's no excuse for [the murder]. It was horrendous." Elliott also said he wishes he would have "gone to the police myself, straightened the situation out with my uncle and my third crime partner [i.e., Thompson]."

2. Social history

Elliott was born March 3, 1943, in Greenville, South Carolina. He has two younger sisters and was raised by both parents. His father was in the military and later worked as an engineer, while his mother was a surgical nurse. He graduated from high school.

Elliott got his first job, in construction, at the age of 16. He worked in construction until the time of his arrest, at 28 years of age, eventually becoming self-employed. He built homes and "did land development."

He married when he was 18 years old, but divorced 12 years later upon discovering his wife was having an affair. They had three children, and Elliott obtained custody of his two sons, while his ex-wife was awarded custody of their daughter.

During his incarceration, he has maintained his relationship with his family, with the exception of his daughter.

Elliott did not use drugs and drank alcohol moderately on social occasions.

3. Prior criminal record

Elliott had no prior juvenile record. As an adult, he was arrested in 1972 for public intoxication and again in 1974 for making a false representation on a financial statement.

4. Parole plans

Elliott stated that he planned to live with his oldest son in Vista, California and serve as a consultant in his son's construction business, to the extent his age and health allowed. Prior to his incarceration, Elliott worked as a licensed contractor in Washington, California and Oregon. Though he was 63 at the time of the hearing, Elliott said he had not looked into what he was entitled to receive from Social Security, since his parents had left him an ample trust fund.

5. Institutional record

At the time of the hearing, Elliott's custody level was medium-AS, with a classification score of 28, the lowest possible for a life-term inmate. While in prison, Elliott obtained his Associate of Arts degree.

Since his previous hearing in 2005, Elliott had not participated in self-help groups, though he had multiple laudatory chronos in his file dating back to 1979. The chronos were for self-help programming (prior to 2005),[2] volunteering as an institutional tour guide and participation in the Men's Advisory Council, among other things. Two of

[2] Elliott's self-help programming included participating in group therapy; completing the "Category-X Program"; "Alternatives to Violence"; "Values & Morals"; "Men's Violence Prevention" and the "Drug/Narcotic Abuse Group." He also served as a member of the "Executive Steering Committee" for the "Victim/Offender Reconciliation Group."

Elliott's laudatory chronos were for providing emergency assistance to inmates in distress, one of whom had been stabbed in the face and eye and the other who suffered an epileptic seizure. Elliott also had many chronos from work supervisors complimenting his demeanor and performance in his work assignments, despite his severe medical disabilities.[3]

During his incarceration, Elliott received eight CDC-115s (violations of institutional rules), the most recent in 1999 for drug trafficking. He has since been discipline-free, however, and not one of his citations was for violent or assaultive conduct.

6. 2009 psychological evaluation

The 2009 evaluation notes at the outset that Elliott declined to be interviewed, and that the evaluator's opinions, including his opinion on Elliott's "violence risk potential," were "based solely on record review." The evaluator assessed Elliott's risk as "[l]ow to [m]oderate," taking into account his "cultural background, possible language issues, personal, social and criminal history, institutional programming, community/social support, and release plans."

Elliott explained to the Board that he did not refuse to participate in the evaluation, but could not physically do so because of an illness. He had no voice, was on several medications and asked for the evaluation to be rescheduled, but the evaluator would not do so. The Board offered to postpone the current hearing, but Elliott declined. The

[3] According to his 2005 mental health evaluation, Elliott was severely injured in an accident in 1968 when "a truck fell on him and crushed his back." He was paralyzed for 18 months, and his spinal cord is compressed and bulging in three places, requiring further surgeries. The spinal cord injury has caused other conditions including a neurogenic bladder, which requires him to use a catheter, because he is unable to tell when his bladder is full. In 1982, Elliott's right foot was smashed in an accident at Folsom State Prison and, despite two surgeries, his foot remains nonfunctional.

Board noted that, if it denied parole, it would request that a new psychological evaluation be conducted so that Elliott could participate.

7. Prior statements regarding the life crime

According to Elliott, the victim was a business associate and jewelry distributor who owed him money. Elliott planned to meet up with the victim on a business trip, when Elliott knew the victim would be carrying jewelry. Elliott and his business partner, Daniel Thompson, would also be carrying jewelry from their business to their meeting. Elliott's uncle, Thomas, who was not known to the victim, would pose as a robber and steal the jewelry from all three men. Elliott would submit an insurance claim on the jewelry he and Thompson were carrying, and sell the jewelry the victim had been carrying. Thompson set up the meeting and while the three men were seated in the victim's car, Thomas approached, heavily intoxicated. He made Elliott drive the car, and when the victim attempted to flee at some point, shot the victim in the head. Elliott, Thompson and Thomas put the victim's body in the trunk and left the car in a parking lot at the San Francisco airport.

Elliott has consistently admitted responsibility for planning to rob the victim and commit insurance fraud, as well as for attempting to cover up the murder after the fact. However, he has also denied that the plan was for Thomas to shoot the victim.

8. Denial of parole

The Board denied parole to Elliott for another three years, finding that he posed an unreasonable risk of danger to society or threat to public safety if released from prison. The Board cited the following factors in support of its denial: the commitment offense; Elliott's prior criminal history, minimal as it was; his failure to participate in self-help over the past 10 years; his presentation to the Board "appear[ed] to be manipulative to some degree"; his minimization of his criminal behavior and disciplinary actions; his disingenuous remorse, as Elliott seemed to say what he thought the Board wanted to hear; and the Board's inability to assess Elliott's insight or understanding of the life crime.

The Board also noted that the 2009 psychological evaluation found Elliott to present a low to moderate risk, but ordered an updated evaluation since Elliott was unable to participate in 2009 due to illness.

On the positive side, the Board found that Elliott possessed viable parole plans and marketable skills and further commended him for remaining discipline-free for 10 years. In conclusion, the Board recommended that Elliott remain discipline-free and engage in self help. The presiding commissioner acknowledged that Elliott had a right not to discuss the crime, but added, "[Y]ou're one of these guys, you've been down a long time, you've done a lot of stuff. I mean, you're in that kind of look at kind of [*sic*] a fine-tuning window here and, you know, it makes it difficult for Panels, you know, to try to evaluate your insight and your understanding of the life crime and that process that you've gone through over the last, the last 30+ years. And we can't, you know, it makes it difficult to explore that with you and for Panels that's very important when we're talking about signing our name to letting you go out and hopefully be a productive citizen in the free community for us to feel confident that hey, this guy's ready."

B. Petition for writ of habeas corpus

On July 24, 2009, Elliott filed a petition for writ of habeas corpus, alleging that the Board's decision to deny him parole was not supported by the evidence. He stated that the Board found him unsuitable for parole "based on the circumstances surrounding the commitment offense, and the inability of the Board to evaluate [his] 'insight into the commitment offense.' "

The superior court issued an order to show cause. In its order, the superior court noted that Elliott had declined to discuss the facts of the commitment offense at his Board hearing. Because the Board could not question Elliott regarding his "insight and understanding of the crime[,] . . . [i]t appears the Board denied him parole because of this exercise of his right." The superior court directed Warden to file a return explaining why the denial of parole "is not a violation of Penal Code section 5011, subdivision (b); CCR

Title 15, § 2236; *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110; and *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491."

In the return, Warden alleged that Elliott's petition did not state a claim that the Board violated his right not to speak about the crime and therefore the issue was not properly before the superior court. However, Warden addressed this issue on the merits, arguing that the Board's decision was not based on Elliott's refusal to discuss the life crime and that there was sufficient evidence to support the Board's conclusion that Elliott was unsuitable for parole.

In the traverse, Elliott admits that he did not cite the Penal Code or the California Code of Regulations in his petition, but he did specifically cite the Board's statement that it could not evaluate his insight and understanding into the commitment offense because he elected not to discuss the life crime at the hearing.

On March 10, 2010, the superior court granted Elliott's petition, finding that the Board had violated his rights not to discuss the crime at the 2009 hearing. The court's order stated that the Board was "requiring a showing of 'insight and remorse' which could only be made if Petitioner relinquished his right not to admit guilt or discuss the crime. The Board was also implying that this was the only thing preventing a parole date given that Petitioner was now in the 'fine-tuning window' and this was mainly what they felt was lacking." The superior court rejected Warden's argument that this claim was not properly raised in Elliott's petition, stating that such petitions are to be liberally construed and the petition specifically quoted the Board's finding that it could not assess Elliott's insight and understanding. Furthermore, the order noted that its order to show cause "recognized this issue and alerted Respondent to its significance." If Warden believed that the order to show cause was overbroad, he should have filed a petition for writ of mandamus in the appellate court. The Board was ordered to provide Elliott with a new hearing within 95 days.

Warden appealed and subsequently petitioned for a writ of supersedeas staying the superior court's order. We denied the petition.[4]

II. DISCUSSION

A. Elliott's subsequent parole hearing does not render the appeal moot

In their supplemental briefs, both Elliott and Warden argue that Elliott's July 1, 2010 parole hearing, held in compliance with the superior court's order, does not render the instant appeal moot. Warden urges that we decide the questions about whether the superior court reached issues not raised in Elliott's petition and whether the superior court's order precludes the Board from relying on Elliott's insight and remorse to deny parole in future hearings where he chooses not to admit guilt or discuss the life crime. Elliott suggests that the Board's findings from the 2009 hearing that he lacked insight could be used against him in future hearings unless this court addresses whether the Board violated his right not to discuss the life crime.

Although Elliott has already had the hearing ordered by the superior court, we are persuaded that the appeal is not moot, since there is a live case or controversy relating to the Board's purported violation of Elliott's right not to discuss the life crime.

B. The issue of failure to discuss the life crime was fairly raised in the petition

In *Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212 (*Ngo*), we considered four separate petitions for writ of mandate in which the Board sought extraordinary relief from four separate superior court orders to show cause on the ground that those orders required the Board to address issues which had not expressly been raised in the four underlying habeas corpus petitions challenging the denial of release on parole.

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[4] In his reply brief, Warden states that the Board held the court-ordered hearing on July 1, 2010 and again found Elliott to be unsuitable for parole. We requested and received supplemental briefing from the parties addressing whether the appeal was thus rendered moot, and we discuss this issue below.

(*Id.* at p. 1220.) In that decision, we reviewed several well-established rules of habeas corpus procedure, as stated below.

"[O]ur Supreme Court has established that the process of defining the issues to be determined in a habeas proceeding begins with the petitioner asserting his or her claims in a petition for writ of habeas corpus. Where necessary, the petitioner may bring new claims before the court by seeking leave to file a supplemental petition. Only those claims raised in the original habeas corpus petition or in a supplemental habeas corpus petition may be considered by the court. [Citations.] Thus, '[t]he court will determine the appropriate disposition of a petition for writ of habeas corpus based on the allegations of the petition as originally filed and any amended or supplemental petition for which leave to file has been granted.' " (*Ngo*, *supra*, 130 Cal.App.4th at pp. 1236-1237.)

Further, "the well-established rules of habeas corpus procedure provide no statutory or decisional authority that permits the superior court to issue an order to show cause that requires the respondent to address new claims not *expressly or implicitly raised in the original habeas corpus petition or supported by the factual allegations* in the original habeas corpus petition, unless those claims were raised by the petitioner in a supplemental or amended habeas corpus petition filed with the permission of the court. [Fn. omitted.] This permits the petitioner to determine what claims will be raised in the habeas corpus petition." (*Ngo*, *supra*, 130 Cal.App.4th at p. 1237, italics added.)

However, we also explained that the rules of habeas corpus procedure provide the superior court with the power to ensure that a habeas corpus claim is properly pleaded. "[T]he superior court has the authority to invite amended or supplemental habeas corpus petitions in the interests of justice. We also recognize that the superior court in crafting the order to show cause has the power to explain its preliminary assessment of the petitioner's claims, restate inartfully drafted claims for purposes of clarity, and limit the issues to be addressed in the return to only those issues for which a prima facie showing has been made. Our Supreme Court has emphasized that the goal of 'the procedures that

govern habeas corpus is to provide a framework in which a court can discover the truth and do justice in [a] timely fashion.' " (*Ngo, supra*, 130 Cal.App.4th at p. 1239.)

Based on this analysis, we determined that three of the four orders to show cause improperly incorporated an order to show cause from a separate, unrelated habeas corpus case. This incorporation constituted an improper consideration of new claims not raised in the habeas corpus petitions, because the order in the unrelated case concerned issues, findings and evidence particular to that case. (*Ngo, supra*, 130 Cal.App.4th at p. 1238.) We also found that the fourth order to show cause was improper since it added an entirely new claim which was not raised by the petitioner nor could it be implied from or supported by the petition's factual allegations. (*Id*. at p. 1239.)

In the present case, we have reviewed Elliott's habeas corpus petition and exhibits and the issues that the superior court in its order to show cause directed Warden to address. Elliott listed two grounds in his habeas corpus petition in support of his argument that he should be released on parole: (1) the denial of parole on the basis of unchanging factors violates Elliott's due process rights; and (2) the Board failed to evaluate Elliott's suitability for parole under the guidelines applicable to inmates sentenced under the Indeterminate Sentencing Law (ISL). The petition also alleged that the Board found Elliott unsuitable for parole "based on the circumstances surrounding the commitment offense, and the inability of the Board to evaluate the petitioner's 'insight into the commitment offense.' " It further quoted the Board, as follows: "[H]e chose not to speak about the crime which is his right. His remorse did appear to be somewhat disingenuous and stated what he thought the panel wanted to hear. This panel could not assess his insight and understanding of the life crime."

In its order to show cause, the superior court noted that the Board seemed to link Elliott's refusal to discuss the life crime with its inability to evaluate his insight and understanding of that offense, suggesting "[i]t appears the Board denied [Elliott] parole because of this exercise of his right [not to discuss the life crime]." The order to show

cause then directs Warden to explain why the denial of parole "is not a violation of" that right.

We agree that the claim that the Board improperly linked its inability to assess Elliott's insight to his refusal to talk about the life crime is not *expressly* raised in the original habeas corpus petition, however, it *is* supported by the factual allegations contained therein. This is sufficient under *Ngo*. (*Ngo, supra*, 130 Cal.App.4th at p. 1237.) The superior court merely took two existing threads from Elliott's petition and wove them together to state the claim. The court did not incorporate an order from an unrelated habeas corpus proceeding and direct Warden to respond to the issues raised in that other proceeding. (*Id.* at pp. 1238-1239.) Nor did the superior court create the claim out of whole cloth. (*Id*. at p. 1239.) Consequently, the issue was properly included in the order to show cause and could serve as a basis for the superior court to grant Elliott's petition.

C. The parole denial and Elliott's refusal to discuss the life crime

Penal Code section 5011, subdivision (b) provides: "The Board of Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed."[5] Warden argues that "[u]nder a plain-language reading of the statute, the statute only applies when the Board sets a parole date, not when the Board considers suitability for parole." We disagree. The Board determines a parole date once it finds an inmate suitable for parole. Consequently, the phrase "when setting parole dates" necessarily encompasses the Board's consideration of an inmate's suitability for parole. Accordingly, under the statute, "[t]he Board is precluded from conditioning [an inmate's] parole on an admission of guilt." (*In re Palermo*, *supra*, 171 Cal.App.4th at p.

[5] As of July 1, 2005, any reference to the "Board of Prison Terms" in the Penal Code refers to the Board of Parole Hearings. (Pen. Code, § 5075, subd. (a).)

1110 (*Palermo*), disapproved on other grounds in *In re Prather* (2010) 50 Cal.4th 238, 252.)

A similar prohibition can be found in California Code of Regulations, title 15, section 2236, which provides in part: "The facts of the crime shall be discussed with the prisoner to assist in determining the extent of personal culpability. The board shall not require an admission of guilt to any crime for which the prisoner was committed. A prisoner may refuse to discuss the facts of the crime in which instance a decision shall be made based on the other information available and the refusal shall not be held against the prisoner."

Warden contends that the Board did not deny Elliott's parole because of his refusal to admit his guilt or talk about the life crime. Rather, the Board justifiably denied parole due to his inability to "satisfy the Board that he had gained sufficient insight, or convince the Board that he did not possess the characteristics of the person who committed this crime."

In *In re Shaputis* (2008) 44 Cal.4th 1241, 1261 (*Shaputis*), the California Supreme Court held that an inmate's lack of insight into his crime and failure to take responsibility for it may constitute some evidence that he currently poses an unreasonable danger to society. California Code of Regulations, title 15, section 2402, subdivision (d)(3) provides that a circumstance tending to show suitability for parole is the following: "Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense." Conversely, a lack of remorse can therefore be considered as a factor tending to show an inmate's *un*suitability for parole.

An essential issue raised in this case is whether the Board can use an inmate's failure to admit his guilt as evidence of a lack of insight. This issue was addressed in both *Palermo* and *In re McDonald* (2010) 189 Cal.App.4th 1008 (*McDonald*).

In *Palermo*, the petitioner Darin Palermo shot and killed his former girlfriend. At trial, Palermo admitted that he shot the victim, but claimed it was accidental. The jury rejected Palermo's claim and convicted him of second degree murder, rather than manslaughter. (*Palermo, supra*, 171 Cal.App.4th at p. 1100.) At his parole hearing, evidence was introduced showing that Palermo still believed a conviction for manslaughter was " 'more appropriate' " because " '[h]e never meant to kill her.' " (*Id.* at p. 1104.) The Board denied Palermo parole due in part to his lack of " 'insight' " into the commitment offense, and encouraged Palermo " 'to continue to work in the area of self-help to continue to build insight.' " (*Id.* at p. 1105.) The Court of Appeal held that the decision to deny parole was erroneous and rejected the argument that "the Board's concerns about [Palermo's] insight were appropriate and were not an indirect requirement he admit he is guilty of second degree murder." (*Id.* at pp. 1110-1111.)

In reaching its decision, the *Palermo* court examined other cases in which the inmate maintained his innocence, stating: "Here, in contrast to the situations in *Shaputis* and [*In re McClendon* (2003) 113 Cal.App.4th 315], [Palermo's] version of the shooting of the victim was not physically impossible and did not strain credulity such that his denial of an intentional killing was delusional, dishonest, or irrational. And, unlike the defendants in [*In re Van Houten* (2004) 116 Cal.App.4th 339], *Shaputis*, and *McClendon*, [Palermo] accepted 'full responsibility' for his crime and expressed complete remorse; he participated effectively in rehabilitative programs while in prison; and the psychologists who evaluated him opined that he did not represent a risk of danger to the public if released on parole. Under these circumstances, his continuing insistence that the killing was the unintentional result of his foolish conduct (a claim which is not necessarily inconsistent with the evidence) does *not* support the Board's finding that he remains a danger to public safety." (*Palermo, supra*, 171 Cal.App.4th at p. 1112.)

In *McDonald*, the petitioner Michael McDonald denied responsibility for killing the victim, Alexander Geraldo, but he was convicted of second degree murder

nonetheless. (*McDonald, supra,* 189 Cal.App.4th at p. 1013.) At his parole hearing, McDonald denied involvement in planning or carrying out Geraldo's murder, and claimed that the Aces of Spades, a secret group of which McDonald was a member, killed Geraldo. (*Id*. at pp. 1016-1017.) Even so, McDonald said "he felt responsible for Geraldo's death because the Aces of Spades used him [McDonald] to get Geraldo to let his guard down." (*Id*. at p. 1016.)

Although the Board found McDonald suitable for parole, the Governor reversed its decision in part because of "McDonald's lack of insight based on his claim of limited responsibility." (*McDonald*, *supra*, 189 Cal.App.4th at p. 1017.) The Court of Appeal vacated the Governor's decision on the ground that there was no evidence that McDonald posed a current danger to public safety. (*Id*. at pp. 1023, 1026.)

In reaching this decision, the *McDonald* court stated: "[L]ack of insight into the nature and magnitude of the offense, is, without question, a proper factor for the Governor's consideration in determining whether the inmate poses a current threat to public safety. [Citation.] However, the conclusion that there is a lack of insight is not some evidence of current dangerousness unless it is based on evidence in the record before the Governor, evidence on which he is legally entitled to rely. That evidence is lacking here, as the Governor cannot rely on the fact that the inmate insists on his innocence; the express provisions of Penal Code section 5011 and section 2236 of title 15 of the California Code of Regulations prohibit requiring an admission of guilt as a condition for release on parole. [¶] The Governor's finding in this case is phrased in terms of McDonald's denial of involvement in the crime; he suggests no other basis on which to find a lack of insight. Were this sufficient, however, it would permit the Governor to accomplish by indirection that which the Legislature has prohibited. Had his statement of reasons indicated that the Governor believed the inmate would pose a threat to public safety so long as the inmate continued to assert that he had not participated in the crime, reversal would be certain. The use of more indirect language, yielding the

same result, cannot compel a different conclusion." (*McDonald, supra*, 189 Cal.App.4th at p. 1023.)

The present case is analogous to *Palermo* and *McDonald*. The Board did not directly state that Elliott was unsuitable for parole due to his refusal to discuss the commitment offense--indeed, the Board stressed that Elliott was not required to do so. Instead, the Board denied parole based, in part, on its findings that it "could not assess his insight or understanding of the life crime." When the presiding commissioner, after expressly acknowledging that Elliott had a right not to discuss the crime, added, "[Y]ou're in that kind of you look at kind of [*sic*] a fine-tuning window here and, you know, it makes it difficult for Panels, you know, to try to evaluate your insight and your understanding of the life crime," there is a direct linkage between Elliott's decision not to discuss the crime and the Board's inability to ascertain his level of insight. Such linkage is improper under Penal Code section 5011, subdivision (b) and section 2236 of title 15 of the California Code of Regulations and thus cannot support a finding of current dangerousness.

D. There was not sufficient evidence to show Elliott's current dangerousness

Parole release decisions are essentially discretionary; they "entail the Board's attempt to predict by subjective analysis" the inmate's suitability for release on parole. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.) Such a prediction requires analysis of individualized factors on a case-by-case basis and the Board's discretion in that regard is " ' "almost unlimited." ' " (*Ibid*.) But as the California Supreme Court later clarified, "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1212 (*Lawrence*).) Accordingly, in exercising its discretion, the Board "must consider all relevant statutory factors, including those that relate to postconviction conduct and rehabilitation." (*Id*. at p. 1219.) That "requires more than rote recitation of

the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision--the determination of current dangerousness." (*Id*. at p. 1210.)

Judicial review of the Board's decision is very deferential. To support the Board's decision, "[o]nly a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the [Board] . . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the [Board], but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the [Board's] decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the [Board's] decision." (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.)

Although *Lawrence* did not change the standard of judicial review of parole decisions set forth in *In re Rosenkrantz*, it did, however, caution that the standard is "certainly . . . not toothless." (*Lawrence*, *supra*, 44 Cal.4th at p. 1210.) "[J]udicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights. If simply pointing to the existence of an unsuitability factor and then acknowledging the existence of suitability factors were sufficient to establish that a parole decision was not arbitrary, and that it was supported by 'some evidence,' a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have no bearing on the paramount statutory inquiry." (*Id*. at p. 1211.) "Accordingly, when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence

supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Id.* at p. 1212.) Stated another way, not only must there be some evidence to support the Board's factual findings, there must be some connection between the findings and the conclusion that the inmate is currently dangerous. In reviewing the order of the trial court, which was based solely upon documentary evidence, we independently review the record. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.)

In denying parole, the Board relied upon the following factors: the commitment offense; Elliott's prior criminal history; his failure to participate in self-help over the past 10 years; his "manipulative" presentation to the Board; his minimization of his criminal behavior and disciplinary actions; his disingenuous remorse; and the Board's inability to assess Elliott's insight or understanding of the life crime. However, the Board failed to explain how these unsuitability factors were linked to its conclusion that Elliott was currently dangerous, other than by noting that Elliott's failure to discuss the life crime made it difficult for the Board to evaluate his insight and understanding of the life crime. As we discussed above, the Board may not use an inmate's refusal to admit guilt or discuss the life crime as a basis for denying parole.

Lawrence does not require that we overturn a parole denial solely due to the absence of some pro forma recitation on the record. There undoubtedly are cases where the inmate's record is so clearly probative of dangerousness that no explicit reasoning is required. (See, e.g., *Shaputis*, *supra*, 44 Cal.4th 1241.) The heart of the due process requirement is that the Board assesses the evidence to decide whether, in its view, the inmate is presently dangerous. The relevant inquiry on review is whether some evidence supports the Board's conclusion that the inmate constitutes a current threat to public safety, not merely whether some evidence confirms the existence of the factual findings. (*Lawrence*, *supra*, 44 Cal.4th at p. 1212.) At minimum, therefore, the Board's reasoning

must be discernable from the record. (See *In re Criscione* (2009) 173 Cal.App.4th 60, 75 [reason for finding of current dangerousness was not apparent from Board's rote recitation of unsuitability factors].) Based on this record, there is not sufficient evidence to support the Board's conclusion that Elliott is presently dangerous, aside from its inability to assess his insight and understanding of the life crime. As discussed above, since that inability to assess Elliott's insight was based on his invocation of his right to refuse to discuss the life crime, the Board is precluded from relying on that factor as a basis for denying parole.

III. DISPOSITION

The order is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Duffy, J.